REPLY BRIEF FOR THE APPELLANTS

IN THE

Supreme Court of the United States

October Term, 1964

No. 360

A. M. HARMAN, JR., ET AL., APPELLANTS,

v.

LARS FORSSENIUS, ET AL.

Appeal from the United States District Court
For the Eastern District of Virginia

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PRELIMINARY STATEMENT

The Brief for Appellees filed herein on January 7, 1965, raises certain points not covered by the initial Brief for the Appellants, and this Reply Brief is being filed to answer such points.

ARGUMENT

I

The Certificate of Residence Is Not a Qualification for Voting.

The uncontradicted record herein shows that payment of a poll tax has been the traditional means of keeping Virginia's roll of permanently registered voters up to date, as such payment serves as proof that the person paying has not abandoned his legal residence in Virginia (R. 76-77, 85, 97). That such payment does in fact prove legal residence

was demonstrated in the initial Brief for the Appellants at pages 21-23, and the argument need not be repeated here.

Having found it impossible in the proceedings below to offer any evidence contradicting the plain facts as revealed by the record (as it was their burden as plaintiffs to do), the Appellees now attempt to confuse the real issues in this case by seeking to discredit the Commonwealth of Virginia and its highest elected officials. Unfounded and unsupported accusations reappear throughout the Brief for Appellees and their legal memoranda filed with the Court below. Examples are found in the unfounded charges that "Virginia seems to be determined to disregard the express provisions of the U. S. Constitution" and "[Virginia] wished to discriminate against the federal voter." (Brief for Appellees, pp. 6, 9.) Other examples are discussed in detail below.

A. The Alleged Intent of the Poll Tax Is Immaterial.

The Appellees attempt to divert the Court's attention from the real issues by citing the *Debates of the Virginia Constitutional Convention of 1901-02*, particularly the statements of some of the more extreme delegates as to what they *intended* to be the effect of making poll tax payment a qualification of the right to vote. But what those gentlemen *intended* payment of the poll tax to be and what it in fact, *became* are two entirely different matters, and the latter alone is germane to the issues herein.

The *Debates* do show that some of the delegates to the Constitutional Convention intended that the poll tax requirement should operate to deny the franchise to Negroes, since most of them were presumably unable at that time to pay even the most modest tax. But it is to be noted first, that racial discrimination is not an issue in these cases and second, that regardless of what some of the delegates to

the Constitutional Convention may have hoped, the poll tax requirement has long since ceased to be an impediment to Negro voting. See *U. S. Civil Rights Comm'n, 1959 Report,* at 118. Indeed, the fact that it would not function as such an impediment was noted some forty-one years ago. See Tunstall, *Wanted: A Constitutional Convention,* 10 *Va. L. Reg., N.S.* 167, 174 (1924).

Furthermore, it has been held that what the Virginia poll tax requirement may have been intended by some to accomplish in 1902 is immaterial, even in a case where the poll tax was directly attacked by otherwise qualified Negroes. The Court said, in *Butler* v. *Thompson,* 97 F. Supp. 17, 21 (E.D. Va.), *aff'd per curiam,* 341 U.S. 937 (1951):

> To plaintiff's second contention—that the draftsmen of the Virginia Constitutional Convention were prompted by evil motives and that this alone invalidates the provisions of this Constitution and subsequent Virginia laws requiring the payment of poll taxes as a prerequisite to voting—there are many answers.
>
> It is admitted that some of the most vocal and violent members of that Convention expressed a desire and purpose to eliminate the Negro as a voter in Virginia. Yet even the most violent of these also expressed an intention to bring about this result by means that were valid under the Federal Constitution or Federal laws. And the expressions of these few can hardly be taken as necessarily voicing the dominant spirit of that Convention. For other voices were raised in the Convention to advance ideas couched in quite a different key.
>
> . . . . Finally, in this connection, it is well settled that a law that is fair on its face and is also fairly administered is not rendered invalid by the evil motives of its draftsmen.

To repeat, the issue for consideration by this Court is what the poll tax has become in fact and in practice, not

what some intended it to be. The record establishes conclusively that voluntary payment of the poll tax has become proof of continuing legal residence, a necessary and convenient adjunct to Virginia's system of permanent registration. (R. 76-77, 85, 97).[1] There was no need, prior to the ratification of the Twenty-fourth Amendment to the Constitution of the United States, to make this fact explicit by legislative or executive pronouncement, for until that time poll tax payment could and did serve as proof of residence as a matter of practice in connection with administration of the election laws in *all* elections.

1. Most states in which permanent registration obtains have some means of verifying the continuing satisfaction of residence requirements by registered persons. The usual means, in states which have not made poll tax payment a voter qualification, is to strike the names of such persons from the registration rolls if they have not voted for a period varying from state to state. For example, in Indiana, registration will be cancelled for failure to vote at the last preceding primary or general election, unless the affected registrant certifies that he still resides at the residence from which he was registered and that he is still a legal voter of his precinct. See *Ind. Stat. Ann.* § 29-3418 (repl. vol. 1949). Likewise, in North Carolina, it is provided that in order to purge the permanent registration list of persons who "have become unqualified since registration," the local election officials shall strike from the lists the names of all persons who have failed to vote for a period of six years. See *N. C. Gen. Stat. Ann.* § 163-31.2 (Supp. 1963). But in Virginia, Alabama and Mississippi, where registration is permanent and payment of a poll tax was, until the Twenty-fourth Amendment was ratified, required in all elections, there is no statutorily specified means of keeping the permanent registration rolls up to date. The reason for the omission in Virginia is, of course, that the poll tax list has served in practice as a convenient means of verifying continuing residence. Possibly the same reason explains the omission in Alabama and Mississippi as well. In Texas and Arkansas, the other two states in which poll tax payment was a voter qualification, there were no provisions for voter registration; in Arkansas, the list of poll tax payers served as a registration list, see *Ark. Stat. Ann.* § 3-118 (repl. vol. 1956), while in Texas, the poll tax receipt, which had to be presented at the polls, provided a certification of the taxpayer's residence. See *Tex. Election Code*, Art. 5.14 (1952). For a summary of the voter qualification laws of all the states in effect in 1962, see *Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 87th Cong. 1st Sess. pt. 5, at 997-1060 (1962).

Ratification of the Twenty-fourth Amendment, however, as the Appellants noted in their initial Brief at page 14, made it necessary to provide for an alternate method of proving residence for those voters who elect not to pay the poll tax. The Virginia General Assembly also authorized such voters to continue to use the traditional method if they chose to do so; thus for the first time the traditional method of proving residence by voluntary payment of poll taxes was embodied in a statute. It is not so, however, as the Appellees assert at page 11 of their Brief, that "the annals of the Commonwealth do not reveal any mention of [poll tax payment being] proof of residence until November 1963." See, to the contrary, *Williams* v. *Commonwealth ex rel. Smith*, 116 Va. 272, 81 S.E. 61 (1914); *Dotson* v. *Commonwealth*, 192 Va. 565, 66 S.E. 2d 490 (1951).

Thus, to summarize, the legislative history of the Special Acts as revealed by the record herein stands clearly and uncontrovertibly to the effect that payment of a poll tax has become as a practical matter a means of proving continuing voting residence in Virginia. The Appellees failed to prove the contrary below, and their present argument, being bottomed upon immaterial assertions that the poll tax might have been intended by some delegates to the 1902 Constitutional Convention to accomplish some other purpose, must fail as well.

B. What Virginia Might Have Done Is Immaterial.

The portion of the Appellee's Argument entitled "Has Virginia had Time?" is also immaterial and misleading, and it should be disregarded. This Court is being asked to pass upon the validity of what Virginia has in fact done; what it might have done is plainly irrelevant. After much study and deliberation, the 1963 Extra Session of the Virginia General Assembly enacted the Statutes Involved, which

in its judgment were the best available means of dealing with serious administrative problems created by the impact of the Twenty-fourth Amendment upon the thoroughly established system of permanent voter registration. The Statutes Involved did not even go into effect until the 1964 Regular Session of the General Assembly was drawing to a close, and they have been *sub judice* ever since the day after their effective date. That the General Assembly might, at a session after the 1963 Extra Session, have considered "constitutional changes concerning poll tax" does not relate to any of the issues in these cases.

C. *Pope* v. *Williams* Is Misinterpreted by the Appellees.

The Appellees have interpreted *Pope* v. *Williams*, 98 Md. 59, 56 Atl. 543 (1903), *aff'd*, 193 U.S. 621 (1904), to stand for a proposition categorically rejected by the Maryland court in its opinion and not passed upon by this Court in its opinion affirming the Maryland court's judgment. The Appellees appear to have confused the two opinions, and to have misunderstood the purpose (as did the court below) for which the case was cited by the Appellants. The Appellees say, at page 8 of their Brief:

> The Maryland statute was upheld on the ground that indication of residency by so registering was a qualification, and subject to control by the state.

But what did the Maryland court say? Its opinion declares, 56 Atl. at 544:

> Nor does the statute impose qualifications for voting, other than those prescribed by the Constitution. It leaves those qualifications precisely as they were before. It deals exclusively with the evidence necessary to establish residence, by providing what the evidence of residence shall be.

Thus, if the Appellees were referring to the Maryland court's opinion, it is obvious that they are utterly wrong. The Appellants cited the *Pope* case only to illustrate the principle that as a matter of state law, which is controlling in such matters, to require proof of voting residence is not to create a voter qualification. This principle is fully borne out by the Maryland court's opinion.

Did this Court say anywhere in its opinion that the Maryland statute created a qualification? Indeed, it did not; in fact, the word "qualification" nowhere appears in its opinion. The sole question decided by this Court in the *Pope* case was whether the statute in question, regardless of what it might or might not do as a matter of state law, violated the "citizenship" or "equal protection" clauses of the Fourteenth Amendment, or was repugnant to the "general spirit" of the Federal Constitution or the "fundamental rights" of citizens. 193 U.S. at 624-25. This Court held, *id.* at 633:

> We are unable to see any violation of the Federal Constitution in the provision of the state statute for the declaration of the intent of a person coming into the State before he can claim the right to be registered as a voter. The statute, so far as it provides conditions precedent to the exercise of the elective franchise within the State, by persons coming therein to reside (and that is as far as it is necessary to consider it in this case), is neither an unlawful discrimination against any one in the situation of the plaintiff in error nor does it deny to him the equal protection of the laws, nor is it repugnant to any fundamental or inalienable rights of citizens of the United States, nor a violation of any implied guaranties of the Federal Constitution.

It is thus clear that the Appellees have erroneously interpreted the *Pope* case at each of its stages of decision.

D. The Appellees' Comparison of the Two Methods of Proof Provided For in the Statutes Involved Is Erroneous and Misleading.

It is well to introduce this portion of the Argument by pointing out to the Court a fact which is plain from the wording of the Statutes Involved, but which was disregarded by the court below and by the Appellees in their Brief. This fact is that the Statutes Involved provide alternate methods of proving residence, *either* of which is applicable to voters in *both* types of elections, state and federal. It is improper to say that the certificate of residence method applies only to the federal voter, or conversely that the poll tax method applies only to the state voter. To be sure, in the vast majority of cases, voters in state elections will prove their residence by paying their poll taxes. For that matter, the Appellants would venture that if the Statutes Involved are allowed to become operative, the vast majority of voters in federal elections will also elect to prove their residence by paying their poll taxes. But the Appellants submit that in a very significant number of cases, voters in state elections will prove their residence by filing the certificate (this would appear to be permissible under the terms of the lower court's Final Order (R. 51), which voids the Statutes Involved only in the elections specified therein), and that it is therefore erroneous to make a rigid state election-poll tax, federal election-certificate classification and to assert, as the Appellees and the court below appear to have asserted, that the certificate is a mere superfluity in state elections and consequently explainable only as a sinister attempt on the part of the Commonwealth to hinder the federal voter.

It is a well-known fact that thousands of members of the armed services cast their ballots in elections held in Virginia. By Article XVII, Section 2, of the Constitution of Virginia, these persons are exempt from assessment with the

poll tax "for all years during a part of which they are hereafter engaged in such service." It is not only conceivable but highly likely that any number of registered voters of Virginia, having entered the armed service for a period of three or more years, will resume their physical residence in Virginia after their discharge and seek to vote in the next state or local election. But since they will not have been assessable with the poll tax for any of the three years next preceding the election year, they will not have proved their residence by paying their poll taxes as provided in the Statutes Involved, and will now be able to do so by filing the certificate of residence.

The fact that the certificate of residence will thus apply to such voters in state elections saps most of what little validity the opinion of the court below and the Appellees' arguments may have had. If the certificate of residence were a "qualification" for federal voters alone, then a state voter would never be required to file it. But as has just been demonstrated, a significant number of state voters will in all probability file the certificate rather than use the alternate means of proving residence. Both by their terms and in practice, the Statutes Involved do no more than establish alternate means of proving residence, applicable to *all* voters in *all* elections held in Virginia. It is plain and fundamental error to single out the certificate of residence, to call it a "qualification" considered separately, when all pertinent state decisional law is to the contrary, or when considered in comparison with its alternate, poll tax payment, which proves precisely what is sworn to in the certificate, and to say that it applies only to federal voters when it manifestly does not, and to conclude that it thus violates Article I, § 2 and the Seventeenth Amendment of the Constitution of the United States. Yet this is exactly what the court below has done, and it seems to be what the Appellees are presently arguing.

The Appellants submit that the table prepared by the Appellees, comparing the legal requirements for election of the House of Delegates and of federal officers is incomplete and misleading, and we offer for consideration by the Court the following table, which more accurately reflects the applicable law.

Electors of the House of Delegates	Electors of Federal Officers
1. Must be registered under *Va. Code* § 24-67 (requiring poll tax payment as a condition precedent) *Va. Const.* § 18; *Va. Code* § 24-17.	1. Must be registered under either *Va. Code* § 24-67 or § 24-67.1 (omitting poll tax payment, which may no longer be required in light of *U. S. Const. Amend.* XXIV) *Va. Const.* § 18; *Va. Code* § 24-17.1.
2. Must have paid poll taxes, if any, assessable for the three years next preceding election year, at least six months prior to election. *Va. Const.* § 18.	2. No poll tax payment required. *Va. Code* § 24-17.1 (reflects change in law effected by *U. S. Const. Amend.* XXIV).
3. Must be at least 21 years old. *Va. Const.* § 18.	3. Must be at least 21 years old. *Va. Const.* § 18.
4. Must have been residents of the state at least one year and of their political subdivision at least six months prior to election. *Va. Const.* § 18.	4. Must have been residents of the state at least one year and of their political subdivision at least six months prior to election. *Va. Const.* § 18.
A. Must prove state and local residence by either	A. Must prove state and local residence by either
(i) paying poll taxes, if any, assessable for the three years next preceding election year, at least six months prior to election, or, at their option,	(i) paying poll taxes, if any, assessable for the three years next preceding election year, at least six months prior to election, or, at their option,
(ii) filing certificate of residence no earlier than October 1 of year preceding election year and no later than six months prior to election. *Va. Code* § 24-17.2	(ii) filing certificate of residence no earlier than October 1 of year preceding election year and no later than six months prior to election. *Va. Code* § 24-17.2

There is no need to repeat the argument previously made in the Brief for the Appellants that the acts of assessment with and payment of poll taxes prove inherently that which must be sworn to in the certificate, and that the differences between the two methods of proof, so heavily stressed by the Appellees, are purely formal and unsubstantial. The Appellants find it remarkable, however, that the Appellees, at one point in their Brief (at pages 13-14) insist that the formal *similarities* in administrative treatment accorded by the Special Acts (for obvious reasons of administrative economy) to the lists of persons who have paid poll taxes and to the lists of persons who have filed certificates mean that the certificate is a qualification, while at another point (page 15), they insist that the formal *differences* between the two methods of proof mean that the certificate is a qualification. Is this not blowing hot and cold in the same breath?

E. The Massachusetts Analogy Is Appropriate.

The analogy of *Mass. Gen. Laws Ann.* ch. 51, § 43 (1958), is, contrary to what the Appellees have asserted, most appropriate. It is immaterial that, in Massachusetts, poll tax payment is not an elector qualification. The material points are that, just as Virginia has for years accepted poll tax payment, Massachusetts will accept a tax bill or notice as proof of voting residence of a male voter, and further, that Massachusetts will accept it as such proof, in lieu of a certificate of such voter as to his residence. The Appellees' attempt to distinguish this analogy on the ground that poll tax payment is not a voter qualification in Massachusetts is quite as futile as an attempt to distinguish it on the ground that women need not pay a poll tax in Massachusetts would have been.

II

The Statutes Involved Do Not Violate the Equal Protection Clause of the Fourteenth Amendment

Lurking in the Appellees' argument on the merits (part I of their Brief) and coming into the open in their argument on the scope of the Final Order of the court below (part II of their Brief) and in their rephrasing of Question 2 of the Questions Presented (Appellees' Brief, page 2), is the contention that the Statutes Involved discriminate against the federal voter, deny him equal protection of the laws, and are therefore invalid under the Fourteenth Amendment. The Appellees are forced to make this argument—traditionally the "last resort of constitutional arguments," *Buck* v. *Bell,* 274 U.S. 200, 209 (1927) (Holmes, J.)—explicit, because they must realize that without it, the improper extension by the court below of its Final Order to elections of the federal executive cannot stand. (See Brief for the Appellants, pp. 25-26.) Of course, it is clear as day that the court below based its judgment solely and exclusively upon Article I, § 2 and the Seventeenth Amendment (R. 43). The Fourteenth Amendment is not cited once in its opinion (R. 42-50). But even if the court below had found that the Statutes Involved violate the Fourteenth Amendment, its finding would have been as erroneous as the argument presently being made by the Appellees.

In the first place, the Statutes Involved, by their plain wording, apply not to federal voters alone, or to state voters alone, or to both separately, but rather to *all* voters indiscriminately in *all* elections—they comprehend the entire electorate in Virginia (R. 9). Their purport is quite simple: every person offering to vote in every primary or general election held in the state must prove his residence either by filing the certificate of residence or by paying his poll taxes. The Appellants have previously demonstrated the

fallacy in classifying the electorate into state voters, who alone, it is claimed, will prove their residence by paying poll taxes, and federal voters, who alone, it is also claimed, will prove their residence by filing the certificate. Such a classification has no foundation in the language of the statutes or in fact, and absent classification or distinction between persons in law or in practice, there is no initial foundation at all for an "equal protection" argument. It is so well settled that citation of authority is unnecessary that legislation affecting all equally within the sphere of its operation does not deny equal protection. The Statutes Involved require every voter in the state of Virginia to prove his residence, by either one of two rationally interchangeable methods therein provided for; they act with equality upon all within their ambit; and consequently they do not violate the Fourteenth Amendment.

But even if it could be said that the Statutes Involved do effectively classify the electorate into state and federal voters, and require the federal voter to prove his residence only by filing a certificate of residence (which is plainly not the case), they would still be valid under the Fourteenth Amendment. It must be remembered that not all classifications are proscribed thereby, but only those made without reason or upon an irrational basis. As this Court observed in *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573, 578 (1938):

> No question. . . . could be made. . . . as to the right of a state. . . . to enact laws or ordinances based on reasonable classification of the objects of the legislation or of the persons whom it affects. "Equal protection" does not prohibit this. Although the wide discretion as to classification retained by a legislature, often results in narrow distinctions, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification. . . . Indeed, it has long been the law under the 14th Amendment that "a distinction in

> legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it. . . ."

And more recently, in *McGowan* v. *Maryland,* 366 U.S. 420, 425-26 (1961), it was said:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

An example of these principles in application in a case substantially indistinguishable from what the Appellees say the present cases are is found in *Pope* v. *Williams,* 193 U.S. 621 (1904), *affirming* 98 Md. 59, 56 Atl. 543 (1903), discussed briefly above. The statute in question in the *Pope* case provided that every person moving into the State of Maryland was required, as a condition precedent to being permitted to register to vote, to indicate his intent to become a resident by recording it in an official record book kept for that purpose. The statute thus by its express terms affected only a limited portion of the entire Maryland electorate, as, according to the Appellees, the Statutes Involved affect only voters in federal elections in Virginia. The petitioner in *Pope,* being a member of the affected class, argued, as the Appellees presently argue, that the classification offended the equal protection clause. This Court rejected the argument.

While this Court's reasoning on the petitioner's equal protection claim was not articulated so explicitly as might

be desired, the Appellants submit that the Court rejected the claim because there was a reasonable basis in fact for the classification complained of. Maryland could not be sure that persons having merely a recently acquired physical presence in the state also had the intent necessary for establishing residence there for purposes of qualifying to register and vote. Consequently, the challenged statute was enacted to insure that such persons did in fact possess the required intent. See the opinion of the Maryland Court of Appeals, 56 Atl. at 544. As complete acquisition of voting residence by newly arrived persons could reasonably be doubted by the state, it could reasonably enact class legislation affecting such persons alone, requiring them to prove the element of residence doubted to exist, without offending the equal protection clause.

The Statutes Involved, even conceding *arguendo* the Appellees' distorted interpretation of them, may be harmonized with the equal protection clause on exactly the same basis. Prior to ratification of the Twenty-fourth Amendment, Virginia could be certain that all permanently registered persons voting in federal elections in the state were qualified residents because they could and were required to pay their poll taxes prior to the election, thus proving their continuing satisfaction of Virginia's residence qualifications. The Twenty-fourth Amendment, however, made the system unworkable. Federal voters could no longer be required to pay poll taxes, and just as Maryland in the *Pope* case could not be certain that new arrivals were *bona fide* residents, Virginia no longer had any means of verifying the continuing residence of persons offering to vote in federal elections. Accordingly, just as Maryland was upheld by this Court without hesitation in the *Pope* case in enacting a statute affecting only the class (new arrivals) as to which it was reasonably uncertain, requiring members of the class

to eliminate the uncertainty in the manner provided, Virginia should be upheld even if it had enacted a statute affecting only a class (federal voters who have not paid their poll taxes) as to which it is reasonably uncertain, the uncertainty being eliminated in the manner provided in the Statutes Involved.

Of course, the Statutes Involved are not restricted in their operative effect to requiring federal voters and no others to file the certificate of residence, as the Appellees would have this Court believe. On the contrary, the Statutes apply to every voter in every election, offering to all two alternate methods of proof. But, as the foregoing argument has shown, even if the Statutes Involved were so limited, the applicable principles of the law, as illustrated by *Pope* v. *Williams supra*, dictate that they should not be held to violate the Fourteenth Amendment.

Respectfully submitted,

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PROOF OF SERVICE

I, Richard N. Harris, one of the attorneys for the Appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of January, 1965, I served copies of the foregoing Reply Brief for the Appellants on the several Appellees hereto by mailing same in duly addressed envelopes, with first-class postage prepaid to their respective attorneys of record as follows: H. E. Widener, Jr., Esq., Widener & Widener, Attorneys at Law, Reynolds Arcade Building, Bristol, Virginia; L. S. Parsons, Jr., Esq., Parsons & Powers, Attorneys at Law, Maritime Tower, Norfolk, Virginia.

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